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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

J. Glose
Ch. P. W.

DECISION

FILE: B-187055

DATE: March 4, 1977

MATTER OF: Samuel Bernstein - Forfeiture of Annual Leave

DIGEST: Employee did not use approved use-or-lose annual leave because of alleged delays in processing disability retirement application. Absent agency regulation requiring counseling on impending forfeiture of annual leave, possible misunderstanding arising from informal discussion with agency personnel as to forfeiture does not provide administrative error basis for restoration of leave.

Mr. DuWayne D. Brown, an authorized certifying officer of the United States Government Printing Office (GPO), asks whether the situation described below constitutes an administrative error for purposes of restoration of annual leave.

It is stated that Mr. Samuel Bernstein, a GPO contract specialist, grade GS-13, made a timely application in early November 1975 which was approved for 80 hours of use-or-lose annual leave for the period December 18, 1975, to January 2, 1976. He did not use the annual leave as scheduled, rather, he worked the entire period except for 1 day of sick leave. On January 5, 1976, Mr. Bernstein requested restoration of the 80 hours leave "because of delays encountered in processing my application for disability retirement."

Additionally, on January 5, 1976, the beginning of the new leave year, Mr. Bernstein reported himself on sick leave. Apparently, he continued in a sick leave status through January 4, 1977, when all available sick leave to him was exhausted and his disability retirement became effective. Mr. Bernstein had applied for disability retirement on November 10, 1975; the Civil Service Commission apparently gave its notice of approval as to disability retirement on January 12, 1976.

It is stated that GPO, in a written notice to all employees dated October 22, 1975, advised them that use-or-lose annual leave had to be scheduled and approved in advance in writing and pointed out that if such leave is cancelled due to public exigency, or if a period of sick leave prevented rescheduling of approved leave, the employee's leave could be restored.

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To preclude misreading of the nature of applicable questions raised by Mr. Bernstein and the agency response to him concerning his leave, pertinent parts of the agency submission read as follows:

"Mr. Bernstein made application for disability retirement on November 10, 1975. He filed his application and supporting documents with Mrs. Mamie Scott, a personnel specialist assigned to the Employment Branch, Operations Division, Personnel Service. Her duties encompass counselling employees on insurance and retirement applications.

"Mr. Bernstein appeared at Mrs. Scott's office on a few occasions after November 24, 1975, and appeared to be apprehensive because of the delay in the processing of his application for retirement. He finally received notice of approval from the Civil Service Commission on January 12, 1976. On one of his visits to Mrs. Scott's office, in November 1975, he allegedly posed the following question: 'What would happen to my accumulated leave in the event that the Civil Service Commission did not approve my application for disability retirement prior to the close of the 1975 leave year?' Mrs. Scott, responded that she did not know, but would make inquiry to the appropriate official in an effort to obtain a decision.

"Mrs. Scott did not ask, but merely assumed that since Mr. Bernstein applied for disability retirement that he was in a sick leave status. Her assumption was based on her experience in dealing with disability retirement applicants. Mrs. Scott's inquiry to the Payroll Section did not enlighten her. She obtained a copy of the Government Printing Office notice, 645-8, Subject: Leave Management for the Remainder of the Leave Year. Paragraph 6 of the notice suggested that questions regarding leave management may be directed to the Personnel Service, Planning and Evaluation Branch.

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"Mrs. Scott telephoned Mr. John L. Hare in the Planning and Evaluation Branch and presented Mr. Bernstein's question. Mr. Hare responded by advising Mrs. Scott to tell Mr. Bernstein that if the approved leave that is not used cannot be rescheduled for use before the end of the leave year, the employee should request restoration of unused leave in a letter through his supervisor to the Director of Personnel. Mrs. Scott left Mr. Hare with the impression that Mr. Bernstein was in a sick leave status. She did not advise Mr. Bernstein to visit or make his own inquiry at Mr. Hare's office nor did Mr. Hare inquire as to Mr. Bernstein's work or leave status.

"Mrs. Scott transmitted the information that she received from Mr. Hare to Mr. Bernstein. He appeared satisfied with the opinion and left her office. Based on the advice that he received, Mr. Bernstein did not go on annual leave during the period scheduled in his leave application. He was of the opinion that if his application for disability retirement was not approved on or before January 3, 1976, that his unused accumulation of annual leave would be carried over to the 1976 leave year."

Informally we understand the agency did include in Mr. Bernstein's lump-sum leave payment his accumulated leave to his credit at the close of the 1975 leave year and the accumulated annual leave for 1976. The only question at issue is whether the subject 80 hours which were forfeited at the close of the 1975 leave year may be restored under the provisions of 5 U. S. C. § 6304(d)(1) as added by subsection 3(2) of Pub. L. 93-181, approved December 14, 1973, 87 Stat. 705. That section of law provides as follows:

"Annual leave which is lost by operation of this section because of-

"(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

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"(B) exigencies of the public business when the annual leave was scheduled in advance; or

"(C) sickness of the employee when the annual leave was scheduled in advance;

shall be restored to the employee."

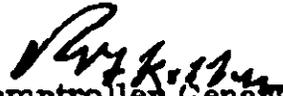
The Civil Service Commission's implementing regulations and guidelines, issued pursuant to 5 U. S. C. § 6311, are contained in the attachment to Federal Personnel Manual Letter No. 630-22, dated January 11, 1974. These regulations were also published in the Federal Register of January 11, 1974, and have been codified in subpart c, part 630, title 5, Code of Federal Regulations.

What constitutes an administrative error under section 6304(d)(1)(A), title 5, United States Code, in a particular case is a matter for which primary jurisdiction lies with the agency involved. 55 Comp. Gen. 784 (1976), and decisions cited therein. As pointed out at page 785, decisions of our Office have construed an administrative error as failure of an agency to carry out written administrative regulations having mandatory effect for the purpose of correcting erroneous pay rates, etc. 31 Comp. Gen. 15 (1951); 34 id. 380 (1955), 39 id. 550 (1960), and 53 id. 926 (1974). We have also held that, when counseling an employee is required by administrative regulations, such as in cases concerning retirement, failure to give correct advice on such matters as the employee's service credits constitutes an administrative error. B-174199, December 14, 1971. The material submitted does not indicate that the agency had a regulation which required that employees be counseled concerning impending forfeiture of annual leave under the circumstances of Mr. Bernstein's situation.

On the facts as presented, we find nothing that would compel a finding of administrative error. On the contrary, it appears that Mr. Bernstein's reason for not taking the annual leave for which he sought and obtained agency approval for the last 10 work days of the leave year cannot be predicated on his conversations with Mrs. Scott. In the absence of the type of regulation indicated above or agency cancellation of the approval for use of his annual leave, we see no basis for restoration of annual leave

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in Mr. Bernstein's statement concerning delays encountered in processing his application for retirement. Accordingly, the question submitted is answered in the negative.


Acting Comptroller General
of the United States